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In the Supreme Court of the United States

OCTOBER TERM, 1943

**WILLARD IRWIN SINGER AND MARTIN H. SINGER,
PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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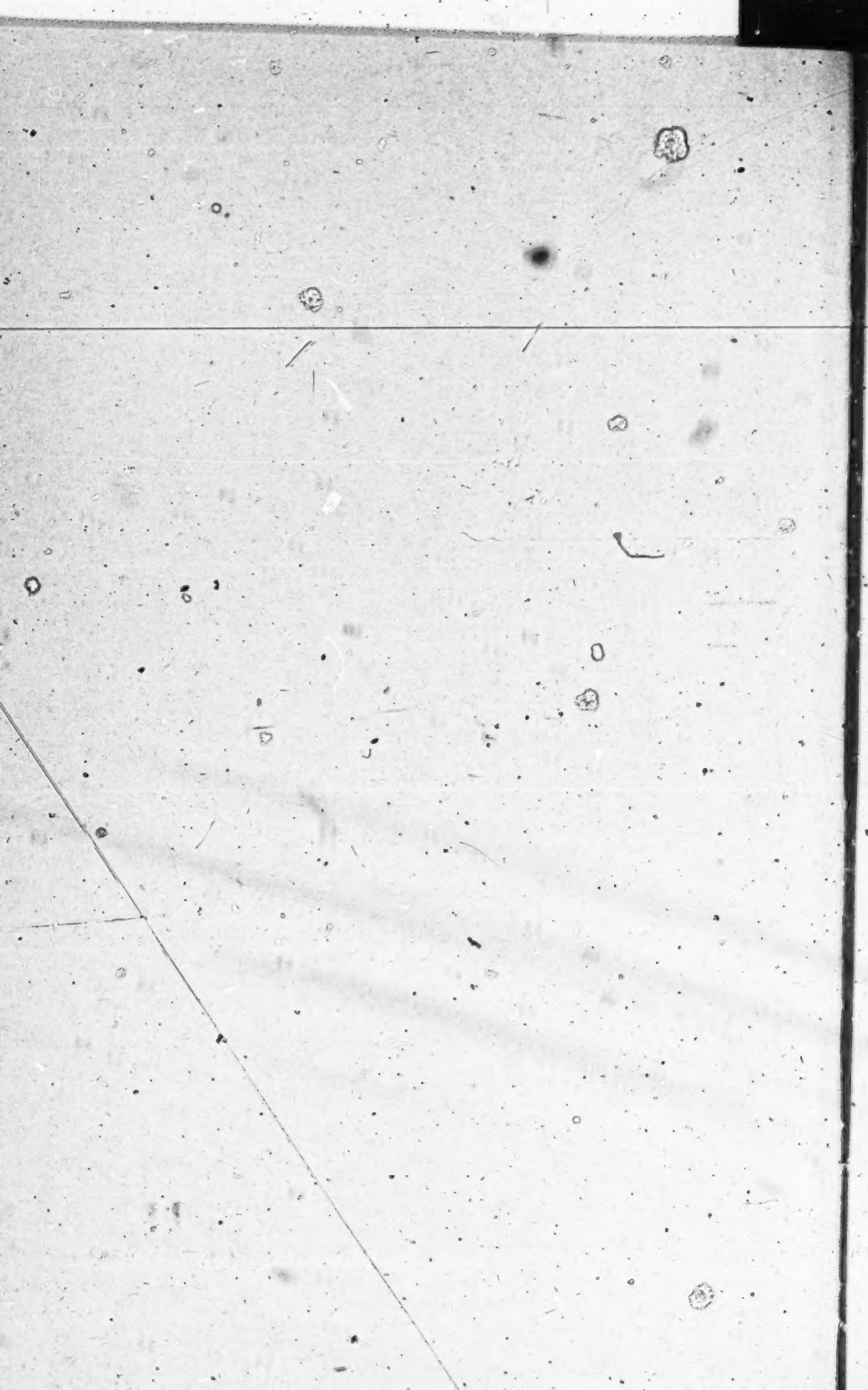
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OCTOBER TERM, 1943

No. 708

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PETITIONERS

v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit is not yet reported (R. 146). The opinion of the district court (R. 4) denying petitioners' motion in arrest of judgment or for a new trial is reported at 49 F. Supp. 912.

JURISDICTION

The judgment of the circuit court of appeals was entered November 29, 1943 (R. 147), and a petition for rehearing (R. 148-151) was denied.

January 12, 1944 (R. 152). The petition for a writ of certiorari was filed February 16, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial-Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioners' conviction for conspiracy to violate Section 11 of the Selective Training and Service Act of 1940.

2. Whether the conspiracy provision of Section 11 of the Selective Training and Service Act of 1940 extends to a conspiracy to evade military service, thus rendering it unnecessary to allege an overt act.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894-895, 50 U. S. C. App. § 311, provides in part:

SEC. 11. Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall

knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, *or conspire to do so*, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, * * *. [Italics added.]

STATEMENT

Petitioners and one Walter Weel were indicted in the United States District Court for the Western District of Pennsylvania in one count charging a conspiracy in violation of Section 11 of the Selective Training and Service Act of 1940 to evade the requirements of that Act and to procure, counsel, assist, aid, and abet petitioner Willard Singer to evade service in the armed forces. The indictment charged that petitioners planned that Willard Singer, a person registered under the Selective Training and Service Act, would, in his questionnaire and at a hearing before his local draft board, make false statements in respect of his own physical condition and the financial responsibility, physical condition, and ability of his father, petitioner Martin Singer, to earn a living; that Martin Singer would submit false affidavits as to his physical condition, financial responsibility, employment, and ability to earn a living in order to aid Willard Singer to evade service in the armed forces; and that Walter Weel would submit a false affidavit in support of a claim for occupational deferment for Willard Singer.¹ A demurrer to the indictment on the ground that it failed to allege overt acts was overruled (R. 8), and petitioners were tried and found guilty (R. 2). A motion for a new trial or in arrest of judgment was overruled (R. 2, 4-6). Petitioner Willard

¹ The indictment is not included in the printed record but is on file in this Court.

Singer was sentenced to imprisonment for one year and one day (R. 2). Imposition of sentence was suspended as to petitioner Martin Singer, and he was placed on probation for two years (R. 2).² On appeal, the judgments were unanimously affirmed (R. 147).

The evidence for the Government may be summarized as follows:

In June 1941, Willard Singer executed and returned to his local draft board his selective service questionnaire (R. 106-107; Ex. 1). As to his own physical defects, he stated that he had "sinus trouble, terrible headaches, feet." He listed his wife as partially dependent upon him and his father and mother as wholly dependent. As the reason for his father's dependency, he wrote, "age and physical condition." He stated that he was an attorney and also, secretary and treasurer of Martin's Grill, Inc., that he owed considerable debts, and that in case of forced liquidation the assets of the corporations which he managed would be sacrificed. (Ex. 1.) Attached to the questionnaire was an affidavit of Martin Singer in which he stated that he was wholly dependent upon his son Willard for support; that he was unable to work; that he had eye trouble and terrible headaches; that he had been forced out of

² Walter Weel was also found guilty and sentenced to imprisonment for one year and one day (R. 2). On appeal, his conviction was affirmed (R. 147), but he has not petitioned for certiorari.

business in the depression and that because of his lack of education he could not procure employment (Ex. 2). An affidavit by Martin Singer containing similar statements was submitted to the board about one year later on May 27, 1942 (Ex. 3).

On May-26, 1942, Willard Singer's local draft board classified him in class I-A (R. 12, 28). His request for a hearing was granted, and on June 9, 1942, he appeared and testified before the local board (R. 26-27). He there stated that his father and mother had no income and were not employed (R. 21, 27). On examination by members of the board, he admitted that his father did go to Martin's Grill but said that he did not spend much time there; that he was not on the pay roll and that no Social Security taxes were paid for him (R. 27). The draft board continued Willard Singer's I-A classification and sent the case to the district attorney for further investigation (R. 29-31).

Numerous witnesses testified that they had observed Martin Singer at Martin's Grill, that he waited on trade (R. 35; 36, 38, 39, 54, 56), prepared sandwiches (R. 38, 41, 61), and directed the employees (R. 38-39, 41, 44). Martin Singer customarily ordered liquor for the grill (R. 47-48), employed and discharged help (R. 50, 52), and generally managed the grill (R. 41, 51, 56, 58, 61, 64, 68). At a hearing before the Pennsylvania Liquor Control Board on October 28,

1940, Martin Singer testified that he customarily came to the grill about noon and remained until closing time (Ex. 7, p. 4; see also R. 51, 53-54, 56, 62). At that hearing he stated that he was "in a way" employed at the grill and that he received a salary from Willard (Ex. 7, p. 5). In Willard Singer's application for a marriage license executed May 9, 1940, he gave the occupation of his father as "purchasing agent of restaurant" (R. 16; Ex. 6).

On June 12, 1942, following Willard Singer's hearing before the local board on June 9, there was filed with the board a request for the occupational deferment of Willard Singer executed by the defendant Walter Weel (Ex. 4). Weel's affidavit stated that he was a coal producer, that his war production contracts consisted of orders for coal with specific priority ratings, and that one hundred percent of his production was for defense purposes; that Willard Singer was general manager and an indispensable employee in that Singer was in charge of contracts for leasing of coal lands, stripping equipment, transportation, and all matters pertaining to production and distribution, and that his removal would curtail production and distribution. Weel did own some coal leases but had not yet produced any coal and had no orders of any kind (R. 71-73, 76; see also R. 92-95, 116-118, 127). Both Weel and Singer testified that Weel did not discuss the affidavit with Singer before he filed it but that Weel told

Singer about it afterwards (R. 95-96, 119-120). Weel's stenographer testified that she had filled out the occupational deferment form at Weel's direction in Willard Singer's office one evening in June 1942 (R. 142-143). The affidavit was notarized by an attorney whose office was close to Singer's (R. 112-113).

ARGUMENT

1. Petitioners' attack upon the sufficiency of the evidence to support the conviction (Pet. 11-14) is, we submit, lacking in merit. There can be no question that in their sworn statements submitted to the local board petitioners sought to create the impression that Martin Singer was physically incapable of sustained employment and that he was not working. At the hearing before the board Willard Singer attempted to explain Martin Singer's presence at the grill as an old man's attempt to make himself useful in a general way. The evidence, however, clearly showed that Martin Singer was actually working at the grill and regularly devoting long hours thereto. Under these circumstances, petitioners' argument that they made no misrepresentation as to dependency (Pet. 12; see also Pet. 5-8) is irrelevant. The jury was fully justified in finding, as they did, that petitioners agreed to submit false statements to the local draft board in an attempt to prevent Willard Singer's induction into the armed forces.

Willard Singer's conviction is further supported by the evidence in respect of the Weel affidavit. The circumstances that the affidavit was prepared immediately after Singer's hearing before the local board when it must have been evident to him that the board intended to continue his 1-A classification, that it was prepared in Singer's office on his typewriter, and notarized by a fellow attorney in his building, all tend to show the existence of an agreement between Singer and Weel. In view of the utter falsity of Weel's affidavit and the false statements of Singer in his questionnaire, the jury, which had the additional advantage of seeing the witnesses, was clearly at liberty to disregard their testimony that Singer did not know of the affidavit until after it had been sent to the local board.

We submit that there is no occasion for this Court to depart from the general rule that, where the district court and the circuit court of appeals have found the evidence sufficient, there is no occasion for review by this Court. *United States v. Johnson*, 319 U. S. 503, 518; *Delaney v. United States*, 263 U. S. 586, 589-590.

2. The question whether the conspiracy clause of Section 11 of the Selective Training and Service Act of 1940 (*supra*, pp. 2-3), which does not require allegation or proof of an overt act, extends to all of the offenses defined in that section or relates merely to a conspiracy to hinder or inter-

fere with the administration of the act by force and violence was, as both courts below stated (R. 4, 146), determined in the case of *United States v. O'Connell*, 126 F. (2d) 807 (C. C. A. 2), certiorari denied *sub nom. Houlihan v. United States*, 316 U. S. 700.³ Contrary to petitioners' assertion (Pet. 14-16), no conflict with the *O'Connell* decision and the decision below is presented by the case of *United States v. Offutt*, 127 F. (2d) 336 (App. D. C.), in which the Court of Appeals for the District of Columbia upheld an indictment laid under the general conspiracy statute (Section 37 of the Criminal Code, 18 U. S. C. 88), which charged a conspiracy to violate Section 11 of the Selective Training and Service Act and alleged overt acts. In the *Offutt* case the Court of Appeals for the District of Columbia assumed that Section 88 was the governing statute and therefore that an allegation of an overt act was necessary. The court's attention was not directed to Section 11, and it did not consider the scope of the conspiracy clause of that section.⁴ It is unnecessary to determine whether a con-

³ See the Government's brief in opposition in that case, No. 1223, October Term, 1941.

The Second Circuit has recently reaffirmed its decision in the *O'Connell* case. *United States v. Keegan et al.*, decided February 29, 1944, but not yet reported.

⁴ In *United States v. Winter*, 38 F. Supp. 627 (E. D. Pa.), also cited by petitioner as establishing a conflict of decisions (Pet. 16), the applicability of Section 88 was not questioned.

spiracy to violate Section 11 may properly be prosecuted under Section 88, for if only one of the statutes is applicable to such a conspiracy, Section 11, as the later special statute, is controlling (*Callahan v. United States*, 285 U. S. 515, 517-518), and here petitioners were indicted under the later statute.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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